March 12, 2009

Diane Lafleur
Financial Sector Policy Branch
Department of Finance Canada
140 O'Connor Street
Ottawa, Ontario K1A 0G5

The Honourable Dwight Duncan
Minister of Finance
Attention: Comments on Report of the Expert Commission on Pensions
c/o Pension and Income Security Policy Branch
5th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Bill Black
Chair, Pension Review Panel
c/o Nova Scotia Labour and Workforce Development
Policy Division
PO Box 697
Halifax, Nova Scotia B3J 2T8

Pension Standards Review
Alberta Finance and Enterprise
Room 402, 9515 - 107 Street
Edmonton, Alberta T5K 2C3

Pension Standards Review
British Columbia Ministry of Finance
PO Box 9418
Victoria, B.C. V8W 9V1

Dear Sirs & Mesdames:

A. <u>The Investment Counsel Association of Canada</u>

The Investment Counsel Association of Canada ("ICAC") represents investment management firms registered to do business in Canada as investment counsel/portfolio managers. Our members are from across Canada and are comprised of both large and small firms managing both institutional and private client portfolios. The ICAC was established in 1952 and its 115 members (see Appendix A) manage in excess of $700B in assets. Our mission is to advocate the highest standards of unbiased portfolio management in the interest of the investors served by members. Member firms are in the business of managing investments for clients in keeping with each client's needs, objectives and risk tolerances.

Collectively, our member firms manage investment portfolios for most of Canada's pension plans, and as such, have special experience with the issues faced by pension plans, their administrators, advisers and portfolio managers with regard to the investment of pension plan assets. We wish to offer our submissions on the recent reports published the Federal Government: *Strengthening the Legislative and Regulatory Framework for Private Pension Plans Subject to the Pension Benefits*

Standards Act, 1985; the Ontario Expert Commission on Pensions: *A Fine Balance*; the Government of Nova Scotia's Pension Review Panel: *Promises to Keep*; and the B.C. and Alberta Report of the Joint Expert Panel on Pension Standards. As our comments are the same in each case, we are addressing our submissions to each of you.

B. Pension Investment Restrictions

As investment managers to pension plans, our comments relate only to the investment restrictions applicable to pension plans under the investment provisions of the Pension Benefits Standards Regulations under the *Pension Benefits Standards Act, 1985* (Canada) ("Schedule III").

As you are aware, Schedule III imposes several quantitative investment restrictions on pensions including:

- a pension plan may not own more than 30% of the voting shares of a corporation;
- a pension plan shall not directly or indirectly lend moneys of the plan equal to more than 10% of the book value of the plan's assets to, or invest moneys equal to more than 10% of the total book value of the plan's assets in, any one person; two or more associated persons; or two or more affiliated corporations;
- a pension plan may hold no more than 5% of its portfolio in a single parcel of real estate or Canadian resource property;
- a pension plan has limits on its total Canadian resources properties and combined resource and real estate properties.

These quantitative rules are notoriously difficult to interpret and apply in practice. They are especially problematic where a pension plan invests through pooled or mutual funds which are already subject to a duplicate set of different quantitative and other investment restrictions. In addition, the various related party rules in Schedule III interact with the quantitative rules in unintended ways.

Schedule III introduces several exceptions to these rules. For example, one exception to the "10% Rule" provides that it shall not apply in respect of investments in an index fund, or a pooled or mutual fund that itself adheres to the investment restrictions in Schedule III. While we believe that such exemptions are appropriate, the practical application of these exceptions is also complicated and potentially undermined by other provisions of Schedule III, which provide that *"the making, holding or acquiring of an investment indirectly by an administrator on behalf of a plan… includes the holding, making, acquiring, owning or lending of an investment, a property or money, as the case may be, by…a mutual or pooled fund or trust fund in which the moneys of the plan have been invested"*.

While we could provide numerous examples of the practical problems presented by Schedule III, these issues are generally well known and have been articulated by other commentators. The ultimate result of these rules has been either: (1) to hamper an investment manager's ability to prudently manage the portfolio of a pension plan in accordance with its investment mandate; (2) to arbitrarily restrict a pension plan's pursuit of investment opportunities that are in the interests of their beneficiaries; and/or (3) to cause pension plans to develop costly legal structures and arrangements which effectively permit the pension plan to circumvent a particular restriction.

We support the recommendation made the Joint Expert Panel established by the B.C. and Alberta governments, as well as others, that that the "investment rules should be set out as broad principles, and that most of the prescriptive quantitative restrictions should be abandoned." Our recommendation is that Schedule III be repealed and replaced with a prudent portfolio rule. The cornerstone of a pension plan administrator's legal responsibility vis-à-vis the investment of a pension fund is prudence. Prudence clearly requires an investor to hold a diversified portfolio. The principles of a prudent portfolio rests on diversification, which are, however, malleable concepts that change over time in response to considerations such as market, economic and social factors such as demographics. In our view, diversification should not be measured and cannot be achieved through quantitative restrictions, which are at best arbitrary. Pension plan administrators and their investment advisors should be bound only by the principle of prudence when directing the investments of a pension fund.

We also support the notion that measures to protect against conflicts of interest should be incorporated in any amended legislation. We continue to support this as a principle-based approach rather than one which is fundamentally prescriptive on the basis that prescription tends to prove to be overly mechanical or inflexible which leads to inappropriate conduct potentially being lawful while appropriate conduct may be technically unlawful.

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We would be pleased to discuss with you or to provide further explanations or submissions regarding the matters which are the subject of this letter.

Yours truly,

Katie Walmsley
President,
Investment Counsel Association of Canada

William Chinkiwsky
Chair, Industry, Regulation & Tax Committee
Investment Counsel Association of Canada

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